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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ROBBIE EARL JOHNSON, Defendant and Appellant.	B218769 (Los Angeles County Super. Ct. No. BA344814)

APPEAL from a judgment of the Superior Court of Los Angeles County, Sam Ohta, Judge. Affirmed.

John Doyle, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Robbie Earl Johnson appeals from the judgment entered following a jury trial which resulted in his conviction of corporal injury to a spouse (Pen. Code, § 273.5, subd. (a))[1] and child abuse (§ 273a, subd. (b)), and his plea of no contest to spousal rape (§ 262, subd. (a)(1)). The trial court sentenced Johnson to three years in state prison. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts*.

Although she has since filed for divorce, in August 2008, M.K. was married to appellant Johnson. The couple had two children, a five-year-old daughter and a four-month-old baby girl.

On the morning of August 8, 2008, M.K. was asleep in her bed. Next to her was her baby and next to the baby was her five-year-old daughter. Johnson, who had been out since the night before, arrived home between 6:00 and 6:30 a.m. He entered the bedroom and told M.K. that he wanted some " 'pussy.' " When M.K., who had to get up to get her daughter ready for school, told Johnson, "no," he responded, "I don't care. I'm going to have it anyways." Although the children were lying in bed next to M.K., Johnson "grabbed [M.K.'s] arm and pushed and started." He took off the pajamas M.K. was wearing and placed his penis in her vagina. M.K. did not push or fight back when Johnson began to have intercourse with her because she "thought he would respond with greater violence, and [she] was scared." In the past, Johnson had "bec[o]me violent when

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

he was drunk and [M.K.] did not obey him." On other occasions, Johnson had attempted to strangle M.K. Once he caused her to have a "nosebleed." Johnson had slapped M.K. and thrown things at her. On another occasion when she had told him that she did not want to have intercourse, Johnson had held M.K. down while he "did the act."

On this occasion, although Johnson was drunk, M.K. asked him to stop in part because their five-year-old daughter would wake up and M.K. did not want her to see them having sex. M.K. suggested that she and Johnson leave the bedroom. Johnson "suspended the act" and went into the living room, pulling M.K. behind him. M.K., who at that point just wanted the incident to end, laid down on the living room couch and told Johnson to "finish it." However, when she then heard one of her daughters start to cry in the next room, she yelled at Johnson, asking him to stop. She had not asked him to stop sooner because she was "afraid of being hit by him in response." Johnson did not stop. He became angry and, although M.K. asked him not to, he touched her breasts and shoulder. M.K., who is approximately 5 feet, 5 inches tall, was unable to get out from under Johnson, who is approximately 6 feet, 1 inch or 6 feet, 2 inches tall. When he did get up, Johnson grabbed M.K. by the hair and arm, pulled her back to the bedroom and threw her down onto the foot of the bed. Making a fist with his hand, he punched M.K. in the head, face and legs, causing "lump[s]" and bruises.[2] M.K. grabbed a pillow from the bed and attempted to cover herself. As she did so, she heard her older daughter

[2] The following day, M.K. was "sore overall" and found a mark on her arm where Johnson had grabbed her.

crying and saying " 'no, no.' " After a minute or two, Johnson stopped hitting M.K., left the bedroom and returned to the living room where he laid down on the couch.

In addition to the physical acts, Johnson had verbally abused M.K. He had told her that if she ever sought a divorce, he would take the children away from her; she would not see them again and she would not be able to take them to Japan to visit her mother. In addition, Johnson had told M.K. that he would "get [her] for the rest of [her] life." At some point, Johnson had threatened to kill M.K. Another time he told her that she was "a lazy, fat bitch who needed to lose weight."

After her older daughter calmed down, M.K. fed her breakfast, dressed her and, taking the baby with her, took the child to school. After doing so, M.K. went to the front of her apartment building and attempted to call the police on her cell phone. When her call was interrupted, M.K. went directly to the police station in Venice. From there she was transported to a medical center where she was examined by a nurse.

Theresa Broms is a nurse practitioner at the Santa Monica-UCLA Rape Treatment Center. She examined M.K. on August 8, 2008. Broms noted that M.K. had "swelling and bruising on the left side of her head. She had bruising on her right . . . upper arm. She had abrasions on her lower right arm. She had bruising on her left thigh, and . . . tenderness [in] all of those areas." Broms performed a genital exam as well as the "extragenital" physical exam. Both examinations were consistent with the history given to Broms by M.K. In addition, M.K. "appeared very traumatized." She "spoke in a very low tone, [was] very quiet[,] . . . was crying at times during the exam" and had "slumped" posture. It appeared to be "very difficult for her to be there and to talk about" what had

happened. M.K. "seemed ashamed and . . . was very frightened." M.K. told Broms that Johnson had told her that he would kill her and "that he was going to get her for the rest of her life." Broms indicated that her findings were "consistent with the history of assault [M.K. had] provided."

2. *Procedural history*.

Following a preliminary hearing, on October 16, 2008 Johnson was charged by information with two counts of forcible spousal rape (§ 262, subd. (a)(1)), one count of inflicting corporal injury on a spouse (§ 273.5, subd. (a)) and one count of child abuse (§ 273a, subd. (b)). It was further alleged that Johnson had suffered a prior serious felony conviction (§ 667, subd. (a)(1)) and that he previously had suffered a serious or violent felony conviction within the meaning of the Three Strikes law (§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). On November 3, 2008, Johnson made a motion to dismiss in furtherance of justice (§ 1385) the prior convictions alleged pursuant to the Three Strikes law.

Prior to trial, defense counsel argued that proposed prosecution exhibits, two photographs of M.K.'s and Johnson's two daughters, were more prejudicial than probative. The trial court found the first exhibit, which showed the two children sitting on M.K.'s bed, relevant. However, the second photograph, which depicted the two youngsters smiling with Santa Clause hats on, was excluded as more prejudicial than probative. The trial court then denied defense counsel's motion to dismiss pursuant to section 1118.1 the two rape counts. The court determined there was evidence the two encounters were nonconsensual and that the question should be determined by the jury.

During a discussion regarding jury instructions, defense counsel noted that M.K. had recently divulged that there had been a prior act of nonconsensual sex with the defendant. Although counsel did not claim that this evidence was intentionally withheld, it was nevertheless prejudicial. Counsel indicated that it had "not come out until testimony in this case." It was not referred to in a prior police report or mentioned in prior interviews. It was not discussed in an Evidence Code section 402 hearing regarding prior acts of domestic violence. Defense counsel indicated that it was enough to warrant an instruction on discovery violations. The trial court disagreed. The trial court stated: "I just don't' see [this] as a discovery violation. What more could the People do than give you the victim? Go talk to her." The court continued, "[T]hey're basically saying they're the victim, she's willing to talk to you, your investigator can talk to her. [¶] How can that be a discovery violation on not turning over information to the [defendant] when they think you've talked to [the victim] and have everything you need from [her]?" After finding no discovery violation, the trial court determined it need not give "the discovery instruction." When defense counsel then made a motion for a mistrial, the trial court denied it.

After beginning deliberations, the jury sent to the trial court a question with regard to the last paragraph of Instruction No. 1000. That instruction deals with the "rape or spousal rape by force, fear, or threats" in violation of section 261, subdivision (a)(2), (6) and (7). The trial court indicated that its proposed response was to "break it down so that the answer is, the defendant is not guilty if he actually believed the woman consented and

that belief was reasonable." When both counsel agreed that its response was appropriate, the trial court wrote it out and sent it to the jury.

After continuing their deliberations, the jury informed the trial court that it had reached a verdict on three of the four counts and was hung on the fourth. The foreperson informed the trial court that the jury was deadlocked on count 2. After taking a poll of the jury, during which most of the jurors indicated they believed having additional time to deliberate might help them reach a verdict, the trial court instructed them to return the following Monday to continue their deliberations.

On the following Monday, the jury foreperson sent to the trial court a note indicating that the jury was at that point deadlocked on both counts 1 and 2 and that additional deliberations would not be helpful. After consulting with counsel, the trial court declared a mistrial as to counts 1 and 2 and took the verdicts on counts 3 and 4. The jury found Johnson guilty of "the crime of corporal injury to a spouse . . . in violation of . . . section 273.5[,] [subdivision] (a), a felony, as charged in count 3 of the information." The jury also found Johnson guilty of "the crime of child abuse . . . in violation of . . . section 273a[,] [subdivision] (b), a misdemeanor, as charged in count 4 of the information." After dismissing the jury, the trial court indicated that on February 24, 2009, or day 29 of 60, it would impose sentence with regard to counts 3 and 4 and hear motions as to counts 1 and 2.

At the proceedings held on February 24, 2009, the People made a motion indicating they wished to retry Johnson on counts 1 and 2. The trial court, after noting that a poll of the jurors had indicated that, as to count 1, the count had been 11 to 1 in

favor of guilt and that, as to count 2, the count had been 8 to 4 in favor of guilt, granted the People's motion. With regard to counts 3 and 4, Johnson waived his right to be sentenced that day or the next day and agreed to be sentenced on April 14, 2009, after the retrial on counts 1 and 2.

Prior to the second trial, the People made an offer to Johnson under the terms of which he would plead guilty or no contest to count 1 and sentenced to the low term of three years in state prison. Because the crime of spousal rape is a violent felony, he would be required to serve 85 percent of the term. In addition, the trial court would sentence him to a concurrent term of three years in prison for his conviction of count 3 at the previous trial.

After M.K. testified, Johnson indicated he wished to take the People's offer and enter a plea. After waiving his right to a trial, to confront and cross-examine the witnesses against him, his right to subpoena witnesses and present a defense and his privilege against self-incrimination, Johnson pleaded no contest to "the crime of spousal rape, in violation of . . . [s]ection 262, subdivision (a), paragraph (1), a felony." The trial court indicated that Johnson would have to pay a $200 restitution fine (§ 1202.4, subd. (b)), a suspended $200 parole revocation restitution fine (§ 1202.45), a $20 court security fee (§ 1465.8, subd. (a)(1)), and a $30 criminal conviction assessment (Gov. Code, § 70373). Then, after informing them that the matter had been resolved, the trial court thanked the jurors for their service and dismissed them.

On July 6, 2009, Johnson indicated that he wished to withdraw his plea. He, however, had no "legal" reason for doing so. The trial court addressed Johnson and

stated: "I remember talking about this at the time of the trial. So the alleged victim testified, and after she testified, she was cross-examined by your lawyer. And, really, that's the way in which the case is decided. And after that, after the questioning of the alleged victim ended, at that point then you had to assess your risk of going forward, and my recollection was that you felt it was in your best interest to end it by taking the three years and making sure that you did not have to register as a sex offender. So you worked out a deal for yourself." After some further discussion, Johnson indicated that he would accept the consequences of entering the plea and he asked to be sentenced.

The trial court imposed the low term of three years for Johnson's conviction of count 1 and the middle term of three years for his conviction of count 3, the terms to run concurrently. As to count 3, the trial court imposed an additional $400 "domestic violence fine" (§ 1203.097). With regard to count 4, Johnson was sentenced to one year in county jail, the term to run concurrently to those imposed for counts 1 and 3. Count 2 was dismissed. Finally, Johnson was awarded presentence custody credit for 333 days actually served and 49 days of conduct credit, for a total of 382 days.[3]

Johnson filed a timely notice of appeal on August 28, 2009.

This court appointed counsel to represent Johnson on appeal on December 14, 2009.

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[3] Counsel for Johnson has made a motion in the superior court to correct the award of presentence custody credits. Counsel indicates Johnson is entitled to 166 days of conduct credit, for a total of 499 days of presentence custody credits.

CONTENTIONS

After examination of the record, counsel filed an opening brief which raised no issues and requested this court to conduct an independent review of the record.

By notice filed July 16, 2010, the clerk of this court advised Johnson to submit within 30 days any contentions, grounds of appeal or arguments he wished this court to consider. No response has been received to date.

REVIEW ON APPEAL

We have examined the entire record and are satisfied counsel has complied fully with counsel's responsibilities. (*Smith v. Robbins* (2000) 528 U.S. 259, 278-284; *People v. Wende* (1979) 25 Cal.3d 436, 443.)

DISPOSITION

The judgment is affirmed.

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CROSKEY, J.

We concur:

KLEIN, P. J.

KITCHING, J.